

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

TERRANCE CROWDER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 96-C-1282 Seth W. Norman, Judge

No. M2003-00680-CCA-R3-PC - Filed October 19, 2004

The Petitioner, Terrance Crowder, appeals the trial court's denial of his petition for post conviction relief. The Petitioner filed his petition outside the statute of limitations and tolling is not applicable. Additionally, petitioner's ineffective assistance of counsel claims must fail because petitioner did not prove that counsel's representation fell below the requisite standard. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed Pursuant to Rule 20, Rules of the Court of Criminal Appeals

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES, and JERRY L. SMITH, J.J., joined.

Kimberly Haas, for the appellant.

Paul G. Summers, Attorney General & Reporter; J. Ross Dyer, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

Petitioner was convicted of rape of a child on March 5, 1997. The petitioner's conviction and sentence were affirmed on appeal. State v. Crowder, No. 01C01-9711-CR-00544 (Tenn. Crim. App. Feb. 9, 1999). The petitioner's attorney did not file a Rule 11 application with the Supreme Court, and the petitioner's attorney did not communicate with him regarding this court's opinion. Sometime in the year 2000, petitioner contacted the Court of Criminal Appeals and learned that the court's opinion had been released in February 1999. On February 23, 2001, petitioner filed a motion requesting that this court vacate and reinstate its opinion so that he could file an application for permission to appeal to the Supreme Court. On March 1, 2001, this court entered an order denying the requested relief. In the order, the court noted that "it appears the statute of limitations would prevent the appellant from obtaining post-conviction relief in this case."

On February 28, 2002, almost a year after this court's March 1, 2001 order, petitioner filed a petition for post-conviction relief. The court appointed counsel for petitioner and a hearing was held. Following the hearing, the court denied petitioner post-conviction relief.

Tennessee Code Annotated Section 40-30-102(a) provides that a petition for post-conviction relief must be filed within one year from final judgment. The appellant filed his petition beyond the time allowed by the statute, and none of the enumerated exceptions to this time limit apply in this case. See Tenn. Code Ann. § 40-30-102(b). Under the Post-Conviction Procedure Act, exceptions to the statute of limitations are explicitly set forth, *i.e.*, (1) claims based upon a new rule of constitutional law applicable to a petitioner's case, (2) claims based upon new scientific evidence showing innocence, and (3) claims based upon sentences that were enhanced because of a previous conviction and the previous conviction was subsequently found to be illegal. See Tenn. Code Ann. § 40-30-102(b)(1)-(3) (2003 Repl.). Petitioner has failed to assert one of these exceptions for tolling the statute. He cites no new constitutional rule, refers to no new scientific evidence, and makes no claim that an earlier conviction has been overturned. See Tenn. Code Ann. § 40-30-106(g) (2003 Repl.).

Petitioner argues that the statute of limitations should be tolled by due process considerations pursuant to State v. Williams, 44 S.W.3d 464 (Tenn. 2001). In Williams the Supreme Court explained that "[w]here circumstances beyond the petitioner's control preclude him from actively raising his post-conviction claims, the statute of limitations should be tolled." Notwithstanding petitioner's attempt to bring his case under the umbrella of due process tolling contemplated by Williams, the facts of this case simply do not warrant tolling. The petitioner admits that he learned that this court had filed its opinion when he contacted the court in 2000. In any event, the petitioner took no action until February 23, 2001, when he requested that this court vacate and reinstate its opinion. This court denied the requested relief on March 1, 2001. Although the court addressed the fact that it appeared that the statute of limitations had expired for post-conviction purposes in the March 1, 2001 order, petitioner again took no action for almost a year. It was not until February 28, 2002, that petitioner first requested post-conviction relief. Based on the facts of this case, tolling of the statute of limitations is not proper.

Finally, this court has reviewed the findings made by the trial court with regard to petitioner's ineffective assistance of counsel claims. This court determines that even if the petitioner had timely filed his petition for post-conviction relief, he would not be entitled to any relief. When a claim of ineffective assistance of counsel has been raised, a convicted defendant must prove, by clear and convincing evidence, that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Burns, 6 S.W.3d 453 (Tenn. 1999). "Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. The trial court specifically found that petitioner failed to prove that counsel's representation fell below the requisite standard. This court agrees.

The petitioner made several claims of ineffective assistance of counsel, including: counsel was ineffective in failing to withdraw as counsel pursuant to Supreme Court Rule 14; counsel was ineffective in failing to request an instruction on the lesser included offense of attempted rape; counsel was ineffective in failing to attack the question of jurisdiction of the court over his person; counsel was ineffective in failing to present evidence that, unlike the victim, the petitioner was not infected with chlamydia; counsel was ineffective in failing to object to testimony relating to child sexual abuse syndrome; and counsel was ineffective in admitting a prior consistent statement of the victim at trial, because it opened the door for the subsequent admission of other consistent statements of the victim.

As the trial court explained in its order, petitioner's inactivity in filing a petition for post-conviction relief almost one year after this court denied a motion to vacate and reinstate its opinion "lends no weight to petitioner's claim that he was prejudiced by counsel's inaction while the petitioner himself appeared to lag in his protest." Although counsel admittedly failed to properly withdraw from representation pursuant to Supreme Court Rule 14, the petitioner failed to present sufficient evidence that he was prejudiced. The lower court reviewed petitioner's post-conviction claims and found that each failed. This issue is without merit.

Further, as the trial court found, counsel made a tactical decision in not asking for an instruction on attempted rape because the petitioner's defense was that no such conduct had actually occurred. Counsel testified that in his view, the case was "all or nothing" – either the rape occurred or it did not. Additionally, counsel made a tactical decision to introduce testimony relating to child sexual abuse syndrome. Counsel testified that the introduction of testimony regarding child sexual abuse was done to convince the jury that the rape did not occur, as the victim did not exhibit any of the symptoms of child sexual abuse syndrome. It is a steadfast principle that this court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). These issues are without merit.

Finally, as to the petitioner's remaining claims, the trial court found that petitioner failed to present sufficient evidence that he was prejudiced by counsel's actions. After a review of the record, this court must agree. We determine that petitioner failed to present sufficient evidence that he was prejudiced in counsel's actions relating to failure to object to the jurisdiction over the petitioner, as the court had jurisdiction over petitioner. The evidence at trial showed that petitioner was eighteen years of age, and thus not a juvenile, when the acts complained of occurred. Further, the petitioner failed to present sufficient evidence that he was prejudiced by counsel's failure to introduce medical evidence that he was not infected with chlamydia. As the trial court found, "[t]he debate over the chlamydia evidence is not convincing of whether the petitioner received effective assistance of counsel. Testimony offered at the evidentiary hearing was of minimal assistance and few conclusions [as] to the nature of the virus were determined." Evidence was presented at trial that petitioner's fiancé with whom he was sexually active was not infected with chlamydia. As counsel repeatedly testified at the hearing, he attempted to demonstrate that petitioner did not have chlamydia, but did not do so with medical records. As counsel testified, it was his opinion that this

issue was not germane to his defense strategy. As for the introduction of prior consistent statements, petitioner failed to show that the outcome of the trial would have been different without this evidence. Counsel explained that he introduced the statements not to show consistencies, but to point out inconsistencies. Counsel testified that the victim made an excellent witness, and he was attempting to show any minor inconsistencies that she had made in her story. As counsel explained, he had to attack the victim's credibility very subtly. Petitioner's ineffective assistance of counsel claims must fail.

Petitioner's post-conviction petition is barred by the statute of limitations. Moreover, petitioner's ineffective assistance of counsel claims are without merit. The judgment is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals. Because the appellant is indigent, costs are taxed to the State.

ROBERT W. WEDEMEYER, JUDGE